

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA

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8 ALETA ROSE GOODWIN, ROBERT PAUL ) 3:09-CV-306-ECR-PAL  
9 MCARTOR, and HEATHER GABEL, )  
10 individually and on behalf of a )  
11 class of similarly situated )  
12 individuals; JOSEPH JONES, MEISA ) Order  
13 JONES, MICHAEL R. TIERNEY and )  
14 FREDRICK TULIP, individually and )  
15 on behalf of a class of similarly )  
16 situated individuals; LINDA R. )  
17 BARBA; CYNTHIA and CHARLES FLAGG; )  
18 JANICE GANNON; WILLIAM DAN KLUTTZ; )  
19 BRIAN E. JONES; JAMES H. MULLENNIX )  
20 and JEANNE K. MULLENIX; HEATHER )  
21 MONAHAN and GEORGE R. MORENO; )  
22 TRAVIS RAWLINGS and SYLVIA )  
23 RAWLINGS; JOHN SULLIVAN and DEBBIE )  
24 SULLIVAN; JOSEPH E. THURSTON and )  
25 ARLENE THURSTON; JESUS TOVAR; )  
26 JOHN F. WILBURN; and ROSALIE W. )  
27 WILBURN, )  
28 Plaintiffs, )  
vs. )  
EXECUTIVE TRUSTEE SERVICES, LLC.; )  
COUNTRYWIDE HOME LOANS, INC., a )  
New York corporation; )  
MERSCORP, INC. a Virginia )  
corporation; MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEMS, INC., a )  
subsidiary of MERSCORP, Inc. a )  
Delaware Corporation; RECONTRUST )  
COMPANY; SAXON MORTGAGE INC.; )  
T.D. SERVICE COMPANY; DEUTSCHE )  
BANK NATIONAL TRUST COMPANY; )  
OCWEN LOAN SERVICING, LLC; WESTERN )  
PROGRESSIVE, LLC.; AHMSI DEFAULT )  
SERVICES, INC.; QUALITY LOAN )  
SERVICE CORPORATION; NATIONAL )  
DEFAULT SERVICING CORPORATION; )  
AZTEC FORECLOSURE CORPORATION; )

1 FEDERAL HOME LOAN MORTGAGE )  
 CORPORATION, a Virginia )  
 2 corporation; FEDERAL NATIONAL )  
 MORTGAGE ASSOCIATION, a District )  
 3 of Columbia corporation; GMAC )  
 MORTGAGE, L.L.C., a Delaware )  
 4 corporation; NATIONAL CITY )  
 MORTGAGE, a foreign company and a )  
 5 division of NATIONAL CITY BANK, )  
 a subsidiary of National City )  
 6 Corporation; NATIONAL CITY )  
 CORPORATION, a Delaware )  
 7 corporation and a subsidiary of )  
 PNC Financial Services, Inc.; )  
 8 PNC FINANCIAL SERVICES, INC., a )  
 Pennsylvania corporation; J.P. )  
 9 MORGAN CHASE BANK, N.A., a )  
 New York corporation; )  
 10 CITIMORTGAGE, INC., a New York )  
 corporation; HSBC MORTGAGE )  
 11 CORPORATION, U.S.A., a Delaware )  
 corporation; AIG UNITED GUARANTY )  
 12 CORPORATION, a foreign )  
 corporation; WELLS FARGO BANK, )  
 13 N.A., a California corporation, )  
 dba WELLS FARGO HOME EQUITY and )  
 14 dba WELLS FARGO HOME MORTGAGE )  
 division of WELLS FARGO BANK, N.A., )  
 15 a California corporation; BANK )  
 OF AMERICA, N.A., a Delaware )  
 16 corporation; and GE MONEY BANK, )  
 an Ohio corporation, )  
 17 )  
 Defendants. )  
 18 )  
 19 )

20 This is a putative class action brought by numerous homeowners  
 21 who are in danger of losing or have already lost their homes to  
 22 foreclosure. Plaintiffs assert nine claims for relief, but only  
 23 some of those claims are under our jurisdiction. The claims under  
 24 our jurisdiction are Plaintiffs' first claim for fraud in the  
 25 inducement, fifth claim for wrongful filing of an unlawful detainer,  
 26 and part of Plaintiffs' second, eighth and ninth claims for unjust  
 27 enrichment, injunctive and declaratory relief respectively. Now

1 pending are nine motions to dismiss (## 461, 464, 465, 468, 470,  
2 471, 473, 474 and 476). Plaintiffs opposed each motion, and  
3 Defendants replied. The motions are ripe, and we now rule on them.

#### 4 5 **I. Procedural Background**

6 Plaintiffs filed a class action complaint (#1) and motion for  
7 preliminary injunction (#2) on June 9, 2009. On June 10, 2009, we  
8 granted (#5) Plaintiffs' motion for preliminary injunction to the  
9 extent it sought a temporary restraining order. We restrained  
10 Defendants from pursuing any foreclosure actions against Plaintiffs  
11 or their properties. The temporary restraining order remained in  
12 effect until June 22, 2009. On June 11, 2009, we amended (#10) the  
13 temporary restraining order. On June 22, 2009, we denied Plaintiffs'  
14 motion for preliminary injunction (#2) as moot in light of a  
15 stipulation of the parties (#26) and an Order (#28) of the Court  
16 approving the stipulation.

17 On June 24, 2009, Plaintiffs filed an amended complaint (#47).  
18 On June 29, 2009, Plaintiffs filed a motion (#59) for temporary  
19 restraining order and preliminary injunction. We granted (#67) the  
20 motion (#59) to the extent it sought a temporary restraining order.  
21 The temporary restraining order remained in effect until July 16,  
22 2009. On July 15, 2009, certain Defendants stipulated (#110) that  
23 they would not initiate or advance any foreclosures with respect to  
24 certain properties at issue in this case pending a trial on the  
25 merits. On the same date we entered an Order (#111) approving parts  
26 of the stipulation (#110) and disapproving others. On July 16,  
27 2009, another stipulation (#118) was entered into between certain  
28

1 Defendants and certain Plaintiffs. On July 16, 2009, we held a  
2 hearing to clarify our previous Order (#111). (Mins. (#123).)

3 On July 11, 2009, Plaintiffs filed a motion for preliminary  
4 injunction (#98) and a motion to certify class (#99). Defendants  
5 opposed both motions and Plaintiffs replied. On July 29, 2009,  
6 Defendants Federal Home Loan Mortgage Corporation and Federal  
7 National Mortgage Association filed a motion (#142) for "Protective  
8 Order Staying Discovery and Staying Their Oppositions to Plaintiffs'  
9 Motions for Class Certification and Preliminary Injunction and  
10 Joinder to Certain Defendants' Joint Motion to Temporarily Stay  
11 Proceedings." The motion (#142) was unopposed. Between July 29,  
12 2009, and December 3, 2009, Defendants filed numerous motions to  
13 dismiss (## 141, 143, 145, 153, 154, 156, 161, 162, 163, 164, 165,  
14 166, 167, 173, 198, 200, 202, 227, 243, 342, 344 and 356).  
15 Plaintiffs opposed the motions, and Defendants replied. On January  
16 8, 2010, we granted (#436) Defendants' motions to dismiss and denied  
17 as moot Plaintiffs' motion for preliminary injunction (#98),  
18 Plaintiffs' motion to certify class (#99) and Defendants' motion for  
19 a protective order (#142).

20 On December 9, 2009, pursuant to a transfer order (#412) issued  
21 by the United States Judicial Panel on Multidistrict Litigation, the  
22 claims in this case that are related to the formation and/or  
23 operation of the MERS system were transferred to the District of  
24 Arizona (the "MDL court") and assigned to the Honorable James A.  
25 Teilborg for coordinated or consolidated pretrial proceedings.

26 On January 29, 2010, Plaintiffs filed a second amended  
27 complaint (#443). On March 23, 2010, the MDL court filed an order

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1 (#453) clarifying which claims were under the MDL court's  
2 jurisdiction and which had been remanded to our court. Between  
3 April 7, 2010 and April 8, 2010, Defendants filed nine motions to  
4 dismiss (## 461, 464, 465, 468, 470, 471, 473, 474 and 476).  
5 Plaintiffs opposed the motions, and Defendants replied.

## 6 7 **II. Motion to Dismiss Standard**

8 A motion to dismiss under Fed. R. Civ. P. 12(b)(6) will only be  
9 granted if the complaint fails to "state a claim to relief that is  
10 plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544,  
11 570 (2007). On a motion to dismiss, "we presum[e] that general  
12 allegations embrace those specific facts that are necessary to  
13 support the claim." Lujan v. Defenders of Wildlife, 504 U.S. 555,  
14 561 (1992) (quoting Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889  
15 (1990)) (alteration in original). Moreover, "[a]ll allegations of  
16 material fact in the complaint are taken as true and construed in  
17 the light most favorable to the non-moving party." In re Stac  
18 Elecs. Sec. Litig., 89 F.3d 1399, 1403 (9th Cir. 1996) (citation  
19 omitted).

20 Although courts generally assume the facts alleged are true,  
21 courts do not "assume the truth of legal conclusions merely because  
22 they are cast in the form of factual allegations." W. Mining  
23 Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981). Accordingly,  
24 "[c]onclusory allegations and unwarranted inferences are  
25 insufficient to defeat a motion to dismiss." In re Stac Elecs., 89  
26 F.3d at 1403 (citation omitted).

1 Review on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is  
2 normally limited to the complaint itself. See Lee v. City of L.A.,  
3 250 F.3d 668, 688 (9th Cir. 2001). If the district court relies on  
4 materials outside the pleadings in making its ruling, it must treat  
5 the motion to dismiss as one for summary judgment and give the non-  
6 moving party an opportunity to respond. Fed. R. Civ. P. 12(d);  
7 see United States v. Ritchie, 342 F.3d 903, 907 (9th Cir. 2003). "A  
8 court may, however, consider certain materials – documents attached  
9 to the complaint, documents incorporated by reference in the  
10 complaint, or matters of judicial notice – without converting the  
11 motion to dismiss into a motion for summary judgment." Ritchie, 342  
12 F.3d at 908.

13 If documents are physically attached to the complaint, then a  
14 court may consider them if their "authenticity is not contested" and  
15 "the plaintiff's complaint necessarily relies on them." Lee, 250  
16 F.3d at 688 (citation, internal quotations, and ellipsis omitted).  
17 A court may also treat certain documents as incorporated by  
18 reference into the plaintiff's complaint if the complaint "refers  
19 extensively to the document or the document forms the basis of the  
20 plaintiff's claim." Ritchie, 342 F.3d at 908. Finally, if  
21 adjudicative facts or matters of public record meet the requirements  
22 of Fed. R. Evid. 201, a court may judicially notice them in deciding  
23 a motion to dismiss. Id. at 909; see Fed. R. Evid. 201(b) ("A  
24 judicially noticed fact must be one not subject to reasonable  
25 dispute in that it is either (1) generally known within the  
26 territorial jurisdiction of the trial court or (2) capable of

1 accurate and ready determination by resort to sources whose accuracy  
2 cannot reasonably be questioned.").

### 3 4 III. Discussion

#### 5 A. Fraud in the Inducement

6 Plaintiffs' first claim for relief is fraud in the inducement.  
7 The claim fails to satisfy the particularity requirements of Rule  
8 9(b). Federal Rule of Civil Procedure 9(b) requires that a  
9 complaint "must state with particularity the circumstances  
10 constituting fraud or mistake." FED. R. CIV. P. 9(B). Rule 9(b)  
11 "requires . . . an account of the time, place, and specific content  
12 of the false representations as well as the identities of the  
13 parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d  
14 756, 764 (9th Cir. 2007) (internal quotation marks and citation  
15 omitted). "[I]n a fraud action against a corporation, a plaintiff  
16 must allege the names of the persons who made the allegedly  
17 fraudulent representations, their authority to speak, to whom they  
18 spoke, what they said or wrote, and when it was said or written."  
19 Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1065 (E.D.  
20 Cal. 2010).

21 Plaintiffs' claim fails to satisfy the requirements of Rule  
22 9(b) because Plaintiffs fail to allege, inter alia, the names of the  
23 person or persons who made the allegedly fraudulent representations,  
24 their authority to speak and whether their representations were  
25 verbal or in writing and when and where the alleged  
26 misrepresentation took place.

1 Plaintiffs cite Odom v. Microsoft Corp., 486 F.3d 541 (9th Cir.  
2 2007), for the proposition that they need not identify the  
3 individual who made the allegedly fraudulent representations. Odom,  
4 however, involved a consumer purchase at a Best Buy store. Id. at  
5 554. Fraud was pleaded with particularity with the exception that  
6 the plaintiff did not name the individual cashier who conducted the  
7 allegedly fraudulent transaction. Id. Under those narrow  
8 circumstances the Ninth Circuit created a limited exception to the  
9 general rule that the alleged maker of a fraudulent representation  
10 must be identified: "[I]n the circumstances of a retail transaction  
11 whose full consequences are realized only months later, the employee  
12 of the store need not be named." Id. This case does not involve a  
13 routine retail transaction like the kind at issue in Odom and the  
14 logic of Odom does not apply with the same force.

15 Moreover, Plaintiffs' failure to plead the identities of the  
16 individuals who made the allegedly fraudulent misrepresentations is  
17 not the only deficiency in Plaintiffs' claim. With respect to each  
18 of the statements and omissions alleged, Plaintiffs claim that "an  
19 agent or agent" made the misrepresentation. It is thus unclear how  
20 many parties made the alleged misrepresentations and whether they  
21 were made on one or multiple occasions. Plaintiffs also fail to  
22 plead facts relating to the contexts in which the agent or agents  
23 made the misrepresentations at issue. Plaintiffs do not indicate  
24 whether the misrepresentations were made in person, in writing or  
25 over the phone. This further obscures the context of the alleged  
26 fraud and ultimately deprives Defendants of the specific notice



1 required under Rule 9(b). Plaintiffs' first claim will thus be  
2 dismissed.

3 B. Unjust Enrichment

4 Plaintiffs' second claim for relief alleges unjust enrichment.  
5 Plaintiffs' unjust enrichment claim has been remanded (#453) to us  
6 only with respect to Plaintiffs Linda Barba, John Wilburn and Rosa  
7 and Sergio Diaz. Plaintiffs allege that because the loan contracts  
8 at issue were obtained through fraud and misrepresentation, any  
9 retention of benefits by Defendants is unjust.

10 Under Nevada law, unjust enrichment occurs when "a person has  
11 and retains a benefit which in equity and good conscience belongs to  
12 another." Leasepartners Corp. v. Robert L. Brooks Trust Dated  
13 November 12, 1975, 942 P.2d 182, 187 (Nev. 1997). An action "based  
14 on a theory of unjust enrichment is not available when there is an  
15 express, written contract, because no agreement can be implied when  
16 there is an express agreement." Id. The doctrine of unjust  
17 enrichment thus only "applies to situations where there is no legal  
18 contract but where the person sought to be charged is in possession  
19 of money or property which in good conscience and justice he should  
20 not retain but should deliver to another [or should pay for]." Id.  
21 (quoting 66 Am. Jur. 2d Restitution § 11 (1973)).

22 Plaintiffs contend that because the mortgages at issue were  
23 procured through fraud, they may proceed under an unjust enrichment  
24 theory. Plaintiffs, as noted above, have not alleged sufficient  
25 facts to support a claim for fraud and therefore the written  
26 contract guides the relationship between the parties. Plaintiffs'  
27 unjust enrichment claim thus fails.

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#### IV. Leave to Amend

Under Rule 15(a) leave to amend is to be "freely given when justice so requires." FED. R. CIV. P. 15(a). In general, amendment should be allowed with "extreme liberality." Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 712 (9th Cir. 2001) (quoting Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990)). If factors such as undue delay, bad faith, dilatory motive, undue prejudice or futility of amendment are present, leave to amend may properly be denied in the district court's discretion. Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1051-52 (9th Cir. 2003) (discussing Foman v. Davis, 371 U.S. 178, 182 (1962)).

We have already given Plaintiffs leave to amend their Complaint once. Indeed, this is Plaintiffs' third complaint in this lawsuit, and it is fatally deficient. We therefore conclude that giving Plaintiffs further leave to amend their complaint would be futile.

#### VI. Conclusion

None of Plaintiffs' remanded claims survive the pending motions to dismiss. Plaintiffs' first claim for fraudulent inducement fails to satisfy Rule 9(b). Plaintiffs' second claim for unjust enrichment fails because the parties' relationship is governed by an express, written contract. Plaintiffs' fifth claim for wrongful filing of an unlawful detainer action is not a recognized tort in the state of Nevada. Plaintiffs' eighth and ninth claims are forms of relief, not independent causes of actions. They will therefore

1 be dismissed in light of our dismissal of the underlying substantive  
2 claims.

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4 **IT IS, THEREFORE, HEREBY ORDERED THAT** Defendants' Motions to  
5 Dismiss (## 461, 464, 465, 468, 470, 471, 473, 474 and 476) are  
6 **GRANTED** on the following basis: We lack jurisdiction over  
7 Plaintiffs' claims that were transferred to the MDL court; this  
8 order thus only dismisses the claims remanded to us pursuant to the  
9 MDL court's order (#453) clarifying which claims remain within our  
10 jurisdiction.

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14 DATED: December 2, 2010.

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UNITED STATES DISTRICT JUDGE